

Carroll & Carroll Lawyers, P.C.

Counselors & Attorneys at Law

Since 1905

Lee Carroll (1904-2004)

John Benjamin Carroll, P.C.

Woodruff Lee Carroll, P.C.

Julia M. Zimmer Paralegal

July 2, 2013

Via US Express Mail

Regional Hearing Clerk

US Environmental Protection Agency

290 Broadway, 16th Floor

New York, NY 10007

Re: Docket No. CWA-02-2013-3601

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 JUL -9 A 11:14
REGIONAL HEARING
CLERK

Dear Clerk,

Enclosed please find an original and two copies of the Respondents Answer to Complaint containing Findings of Violation, Notice of Proposed Assessment for a Civil Penalty and Notice of Opportunity to Request a Hearing, with Exhibit A, and an Affidavit of Service in the above reference matter.

Very Truly Yours.

John Benj. Carroll

John Benjamin Carroll, P.C.

JBC/jmz

Enc.

cc:

Lauren Fischer, Esq.

Assistant Regional Counsel

US Environmental Protection Agency

290 Broadway, 16th Floor

New York, NY 10007

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007**

IN THE MATTER OF:

Michael B. Rapasadi

2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi

2106 Lake Road
Oneida, NY 13421

Respondents.

**Proceeding pursuant to § 309(g)
of the Clean Water Act, 33 U.S.C. § 1319(g)**

**Proceeding to Access Class I
Civil Penalty Pursuant to Section
309(g) of the Clean Water Act**

Docket No. CWA-02-2013-3601

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 JUL -9 A 11:14
REGIONAL HEARING
CLERK

**RESPONDENTS ANSWER TO COMPLAINT CONTAINING
FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

The Respondents in Answer to the Complaint, reserving herefrom the Respondents prior motion for dismissal and in the event of denial of the said motion does now request a hearing, and in Answer thereto does now deny the Complaint and does further, in the order alleged, state:

1. Deny the facts support any application of the aforesaid act; Legal conclusions as authority denied as unconstitutional on its face and as applied;
2. Deny the facts support any violation of law; Legal conclusions as authority denied as unconstitutional on its face and as applied;
3. Deny the compliance order attached to the complaint or its enforcement is in accordance with the law and facts or is proper, legal or constitutional;

4. Deny any violation of law by the Respondents;
5. Deny knowledge or information;
6. Deny knowledge and information; Contest legal conclusions;
7. Deny the Respondents are in violation of named acts;
8. Deny the Respondents are in violation and have no access to observed information;
9. Deny the Respondents are liable for any penalty in any amount or that it has been properly determined;
10. The Respondents hereby demand a full fair evidentiary and legal hearing subject to prior ruling and appeals on its prior motion for dismissal (copy of which is attached as Exhibit A). The Respondents lack any knowledge of the meaning of CROP;
11. Denies knowledge or information sufficient to form a belief; Deny characterization of contents;
12. This Response is timely;
13. See above responses. It appears the only factual matters are set forth in Exhibit One, "Findings of Violation and Order" of the Complaint. As to Exhibit One, the Respondents in the order stated, do state:
 1. Deny knowledge and information sufficient to form a belief;
 2. Admit;
 3. Admit Thomas R. Rapasadi is the father of Michael B. Rapasadi; deny his activities are construction;
 4. Deny any proper designation of wetlands;
 5. See no. 4 above, deny sufficient knowledge to admit or deny;
 6. Deny jurisdiction was properly asserted;
 7. Deny activities were construction activities; Deny wetlands;
 8. Deny activities were construction activities;
 9. Deny knowledge of the dates; Deny construction activities;
 10. Deny knowledge of the dates; Deny construction activities;

The Respondents further assert any and all factual and legal defenses available, including but not limited to, constitutionality of the act the regulations, on their face and as applied; the lawful use of the United States Army engineers by the EPA the determinations of the Engineers and the basis therefor and the regulations thereunder including but not limited to, the wetlands and procedural provisions; the claim for regulatory authority over the Respondents land and persons. The loss of due process in fact and law; the definitions of wetlands and the procedures provided.

The Respondents refer to and incorporate herein their motion for dismissal of the complaint, dated June 24, 2013, attached hereto as Exhibit A.

On account of the forgoing violations of law by the agencies involved in failing, within legal time limits, to answer the freedom of information requests of the Respondents have been denied the information needed to determine the jurisdictional and operating facts needed to prepare for or to participate in either the resolution process provided and required by law or to prepare for or participate in this hearing. Thus, due process has been violated. All rights for court review are reserved to the Respondents.

The Respondent received permission from the Town involved before commencing work. The premises by size and standard otherwise are not within the regulatory powers of the EPA or the Army Engineers and if claimed otherwise the basis for such claims is challenged.


The Respondents have been denied, after notice of the need therefore information necessary to make independent determination by themselves or competent experts by the illegal acts of the Complainants alleged herein that have denied the Respondents due process and an

opportunity to usefully determine the jurisdictional and other facts. To the extent of the Respondents' knowledge, Deny each of the factual and legal claims made except admit the Complainant has made and served the charges and findings alleged. Deny that the Respondents have been given the information necessary for the evaluation of the factual and legal basis for the Respondents action. The Respondents further submit that any discharge from the tiny area involved has any real substantial effect upon the purposes of the regulatory scheme; that the determinations made were arbitrary and capricious; that if it be alleged that the regulations authorize the aforesaid action then the same are arbitrary and capricious without rational foundation and should not be enforced here or in a court of law.

Dated: July 2, 2013

Respectfully submitted,

Carroll and Carroll Lawyers, P.C.

A handwritten signature in cursive script, reading "John Benjamin Carroll", written in dark ink over a horizontal line.

By: John Benjamin Carroll, P.C.

440 South Warren Street

Syracuse, New York 13202

Telephone: 315-474-5356

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

IN THE MATTER OF:

Michael B. Rapasadi

2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi

2106 Lake Road
Oneida, NY 13421

Respondents.

**Proceeding pursuant to § 309(g)
of the Clean Water Act, 33 U.S.C. § 1319(g)**

**Proceeding to Access Class I
Civil Penalties Pursuant to Section
309(g) of the Clean Water Act**

Docket No. CWA-02-2013-3601

MOTION TO DISMISS THE COMPLAINT

Upon the attached affidavit of John Benjamin Carroll dated the 24th day of June, 2013,
the undersigned on behalf of the above Respondents hereby moves for an Order of Dismissal.

Dated: June 24th, 2013

Carroll & Carroll Lawyers, P.C.

John Ben. Carroll
By: John Benjamin Carroll, P.C.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

IN THE MATTER OF:

Michael B. Rapasadi
2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi
2106 Lake Road
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Respondents.

**Proceeding pursuant to § 309(g)
of the Clean Water Act, 33 U.S.C. § 1319(g)**

**Proceeding to Access Class I
Civil Penalties Pursuant to Section
309(g) of the Clean Water Act**

Docket No. CWA-02-2013-3601

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS COMPLAINT

John Benjamin Carroll, first being duly sworn, deposes and says:

1) I am attorney for the Respondents herein. I am a duly admitted attorney and counselor of law of the State of New York and duly admitted to the Supreme Court of the United States and District and Circuit Courts of the United States. I make this affidavit in support of a Motion to dismiss the Complaint herein.

2) Attached hereto and numbered and styled as "Exhibit A" is a Complaint against the Respondents served by the Complainant, received by mail by the Respondents at this office on June 7, 2013. This motion is made before the return date for Answer to the Complaint and is returnable to the Regional Judicial Office.

3) The sole basis for action alleged against the Respondents in the Complaint is set forth at "Exhibit 1" to the Complaint (see Exhibit A) denominated "FINDINGS OF VIOLATION ORDER CWA-02-2011-3502".

4) On multiple occasions, this office and myself called the responsible officials, advised them that approval for the work involved had been given by the Town of Lenox before work was commenced; that the Town supported the Respondents; that we requested the information on which the determinations, including the wetlands determination, had been made and the entire history and the facts involved in the finding of violation for our and expert review.

5) We were advised there were multiple regulatory agencies involved; that the enforcement agency did not have the information requested; that we would have to contact another agency who did the work. We did so long ago. There, we were advised we had to make a Freedom of Information Request. We did so (see attached "Exhibit B"). To date, those records have not been received (see attached "Exhibit C"). Were they received, we would need additional records required for proof of mistaken determination made, and experts retained for voluntary cure, if available, and, for the first time, be able to make rational use of our rights.


6) By the foregoing and otherwise, we have been deprived of the opportunity to make use of the pre-suit rights and suit procedures or to prepare a defense and have been deprived of due process generally and specifically. All rights and claims available thereunder are hereby made on behalf of the Respondents who are hard working people with limited resources for whom this proceeding, and the \$25,000 monetary fine sought, is ruinous.

7) Please take notice that we reserve the right to request full relief from the applicable Courts on this or any other relevant grounds.

WHEREFORE the Respondents move for dismissal of the Complaint.

Respectfully submitted,

Carroll and Carroll Lawyers, P.C.


By: John Benjamin Carroll, P.C.
440 South Warren Street
Syracuse, New York 13202
Telephone: 315-474-5356

Sworn to before me this
24th day of June, 2013


Notary Public

JULIA M ZIMMER
Notary Public - State of New York
No. 01ZI6259918
Qualified in Onondaga County
My Commission Expires April 16, 16

Exhibit A

to Motion to Dismiss the Complaint, dated June 24, 2013



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

MAY 31 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Thomas R. Rapasadi
2106 Lake Road
Oneida, New York 13421

Re: In the Matter of Michael B. Rapasadi and Thomas R. Rapasadi
Proceeding Pursuant to §309(g) of the Clean Water Act, 33 U.S.C. §1319(g);
Docket No. CWA-02-2013-3601
Property at 8151 North Main Street, Canastota, NY; Tax Parcel 27.-2-56, Town of Lenox,
Madison County, NY
Department of the Army Enforcement File Number 2010-01319

Dear Mr. Rapasadi:

Enclosed please find a copy of a complaint that has been filed by the U.S. Environmental Protection Agency (EPA) in the Matter of Michael B. Rapasadi and Thomas R. Rapasadi, Proceeding to Assess a Class I Civil Administrative Penalty Under Section 309(g) of the Clean Water Act (the Act), 33 U.S.C. § 1319(g), Docket No. CWA-02-2013-3601 (the Complaint). The Complaint was issued as a result of a determination of the EPA that you and Michael B. Rapasadi are in violation of Section 301 of the Act, 33 U.S.C. § 1311. The Complaint requests that a penalty of \$25,000.00 be assessed against you and Michael B. Rapasadi for this violation. The location of the violation is wetlands at North Main Street, Canastota, NY; Tax Parcel 27.-2-56, Town of Lenox, Madison County, NY.

The Complaint has been filed with the EPA, Region 2, Regional Hearing Clerk pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g). Also enclosed is a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (CROP), 40 CFR Part 22, which describes the procedures which EPA will follow in this penalty assessment proceeding. Please note that Subpart I applies in this proceeding.

This Complaint includes a Proposed Civil Administrative Penalty and a Notice of Opportunity to Request a Hearing. You have the right to request a hearing to contest any allegations set forth in the Complaint or to contest the appropriateness of the proposed penalty. Please pay particular attention to the section in the Complaint entitled "Notice of Opportunity to Request a Hearing," and the requirements for filing an Answer to the Complaint in § 22.15. You have the right to be represented by an attorney, or to represent yourselves at any stage of these proceedings. Any hearing will be conducted in accordance with the CROP. If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an Answer within thirty (30) days of receipt of the enclosed Complaint to the EPA Regional Hearing Clerk at the following address:

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 50% Postconsumer content)

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007-1866

If you do not file an Answer by the applicable deadline, you will waive your right to a hearing and the EPA may file a motion for a default judgment against you. Each allegation in the Complaint will be deemed to be admitted as true by you, and you will have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the Presiding Officer can then find you liable for a civil penalty, and the EPA may then assess against you a civil penalty of up to \$25,000.00 for your alleged violation.

If you wish to resolve this proceeding by paying the penalty proposed in the Complaint in full, please follow the Instructions for Paying Penalty in Section VII of the Complaint. Please be informed that the EPA may not accept payment in full in resolution of this proceeding until at least 10 days after the close of the public comment period for this proceeding. Such date will be 40 days after publication of a legal notice of this proceeding. The EPA will notify you of the date of such publication.

Please be informed that timely payment of the proposed penalty in full, in no way relieves you and Michael B. Rapasadi of the requirement to comply with all provisions of Findings of Violation and Order CWA-02-2011-3502, issued to you and Michael B. Rapasadi on September 20, 2011.

If you have any technical questions, please contact David Pohle, Wetlands Enforcement Coordinator, at (212) 637-3824. If you have any legal questions, please have your attorney contact Lauren Fischer, Esq., Assistant Regional Counsel, at (212) 637-3231.

Sincerely,



Joan Leary Matthews
Director
Clean Water Division

Enclosures

cc: Harold Keppner, Chief
Enforcement and Compliance Section
U.S. Army Corps of Engineers
Buffalo District, Regulatory Branch

Rocco J. DiVeronica
Supervisor
Town of Lenox, New York

John Benjamin Carroll
Carroll and Carroll Lawyers, P.C.

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007-1866

If you do not file an Answer by the applicable deadline, you will waive your right to a hearing and the EPA may file a motion for a default judgment against you. Each allegation in the Complaint will be deemed to be admitted as true by you, and you will have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the Presiding Officer can then find you liable for a civil penalty, and the EPA may then assess against you a civil penalty of up to \$25,000.00 for your alleged violation.

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Please be informed that timely payment of the proposed penalty in full, in no way relieves you and Thomas R. Rapasadi of the requirement to comply with all provisions of Findings of Violation and Order CWA-02-2011-3502, issued to you and Thomas R. Rapasadi on September 20, 2011.

If you have any technical questions, please contact David Pohle, Wetlands Enforcement Coordinator, at (212) 637-3824. If you have any legal questions, please have your attorney contact Lauren Fischer, Esq., Assistant Regional Counsel, at (212) 637-3231.

Sincerely,



Joan Leary Matthews
Director
Clean Water Division

Enclosures

cc: Harold Keppner, Chief
Enforcement and Compliance Section
U.S. Army Corps of Engineers
Buffalo District, Regulatory Branch

Rocco J. DiVeronica
Supervisor
Town of Lenox, New York

John Benjamin Carroll
Carroll and Carroll Lawyers, P.C.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

IN THE MATTER OF:

Michael B. Rapasadi
2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi
2106 Lake Road
Oneida, NY 13421

Respondents.

Proceeding pursuant to § 309(g)
of the Clean Water Act, 33 U.S.C. § 1319(g)

**Proceeding to Assess Class I
Civil Penalty Pursuant to Section
309(g) of the Clean Water Act**

Docket No. CWA-02-2013-3601

**COMPLAINT
FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY, AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

I. Statutory Authority

1. This Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty and Notice of Opportunity to Request a Hearing (Complaint) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 309(g)(2)(A) of the Clean Water Act (Act), 33 U.S.C. §1319(g)(2)(A). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Clean Water Division (CWD) of EPA, Region 2 (Complainant).
2. Pursuant to Section 309(g)(2)(A) of the Act, and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (CROP), 40 CFR Part 22, a copy of which is attached, Complainant hereby requests that the Regional Hearing Officer assess a civil penalty against Michael B. Rapasadi and Thomas R. Rapasadi (Respondents), for the discharge of pollutants into navigable waters, without authorization by the Secretary of the Army as required by Section 404 of the Act, 33 U.S.C. §1344, in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a).

II. Findings of Violation

3. Paragraphs 1-26 of the Findings of Violation and Order Docket No. CWA 02-2011-3502, in the matter of Michael and Thomas Rapasadi, Proceeding Pursuant to Section 309(a) of the Act, 33 U.S.C. §1319(a), dated September 20, 2011 (Compliance Order), are hereby incorporated by reference. A copy of the Compliance Order is attached as Exhibit 1.
4. To date, the Ordered Provisions in Section III of the Compliance Order remain outstanding and, therefore, the violations set forth in the Compliance Order continue.
5. The EPA has consulted with the State of New York regarding this proposed action by mailing a copy of this Complaint and Notice to the appropriate State officials, and offering an opportunity for the State to consult further with the EPA on the proposed penalty assessment.
6. The EPA has notified the public of this proposed action by publishing a Public Notice on the EPA Region 2 website.

III. Conclusions of Law

7. Based on the above Findings, the EPA finds Respondents are in violation of Section 301 of the Act, 33 U.S.C. § 1311, for the discharge of pollutants, as described in the Compliance Order, consisting of fill into waters of the United States from a point source without authorization by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. § 1344.
8. Each day that the subject discharge remains unauthorized by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. § 1344, and/or the Ordered Provisions in Section III of the Compliance Order remain outstanding, constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

IV. Notice of Proposed Order Assessing a Civil Penalty

9. Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. §1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties (Final Order) to Respondents assessing a penalty of **\$25,000.00**. The EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). The EPA has taken account of the nature, circumstances, extent and gravity of the violation, Respondents' prior compliance history, degree of culpability, economic benefit or savings accruing to Respondents by virtue of the violations, and Respondents' ability to pay the proposed penalty. Based on the Findings set forth above, Respondents have been found to have violated the Act.

V. Notice of Opportunity to Request a Hearing

10. Respondents may, within thirty (30) days of receipt of this Complaint and as part of any Answer filed in this matter, request a Hearing on the proposed civil penalty assessment and at the

Hearing may contest the factual allegations set forth in the Findings of Violation contained in Section II above, and the appropriateness of any penalty amount. The procedures for the Hearing, if one is requested, are set out in the CROP, including Subpart I thereof.

11. Please note that should Respondents request a hearing on this proposed penalty assessment, members of the public, to whom the EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. §1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondents not request a hearing, the EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition the EPA to set aside the Final Order and to hold a hearing thereon. The EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by the EPA in the issuance of the Final Order.

VI. Filing an Answer

12. If Respondents wish to avoid being found in default, Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk no later than thirty (30) days from the date of receipt of this Complaint. The EPA may make a motion pursuant to Section 22.17 of the CROP seeking a default order thirty (30) days after Respondents' receipt of the Complaint unless Respondents file an Answer within that time. If a default order is entered, the entire proposed penalty may be assessed without further proceedings.
13. The Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which Respondents have knowledge or clearly state that Respondents have no knowledge as to particular factual allegations in the Complaint. The Answer also shall state:
 - A. The circumstances or arguments which are alleged to constitute grounds of a defense;
 - B. The facts which Respondents dispute;
 - C. The basis for opposing the proposed relief; and
 - D. Whether a Hearing is requested.
14. Respondents' failure to admit, deny or explain any material factual allegations in this Complaint shall constitute an admission of the allegation.

VII. Filing of Documents

15. The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007

16. A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Lauren Fischer, Esq.,
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007

VIII. Instructions for Paying Penalty

17. As set forth in Section 22.18 of the CROP, Respondents may resolve these proceedings by payment of the proposed penalty in full, and by filing with the Regional Hearing Clerk, at the address provided below, a copy of the check or other instrument of payment. Pursuant to Section 22.45(c)(3) of the CROP, opportunity for such resolution of these proceedings is available to Respondents no sooner than 10 days after the close of the 30-day public comment period which commences upon publication of the Public Notice of this proposed action.
18. To pay the proposed penalty in full, Respondents shall send a cashier's check or certified check in the amount of **\$25,000.00**, payable to the "Treasurer of the United States of America." The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Payment methods are described below:

CHECK PAYMENTS:
U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency."

OVERNIGHT MAIL:
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101
Contact: Natalie Pearson
(314) 418-4087

Respondent shall also send copies of such payment to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007

and to:

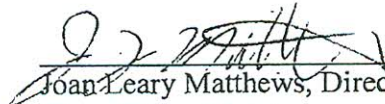
Lauren Fischer, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007
212-637-3231

19. Upon receipt of payment in full, a Final Order shall be issued. Payment by Respondents shall constitute a waiver of Respondents' rights to contest the allegations and to appeal the Final Order.

IX. General Provisions

20. Respondents have the right to be represented by an attorney at any stage of these proceedings.
21. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated thereunder, or any applicable permit.
22. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act, 33 U.S.C. §1319(g), will affect Respondents' continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a), for the violations alleged herein.

ISSUED THIS 30th DAY OF May, 2013.


Joan Leary Matthews, Director
Clean Water Division
U.S. Environmental Protection Agency, Region 2

**Re: In the Matter of Michael B. Rapasadi and Thomas R. Rapasadi
Proceeding to Assess a Class I Civil Administrative Penalty
Under Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g)
Docket No. CWA-02-2013-3601**

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

In the matter of

Michael B. Rapasadi
2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi
2106 Lake Road
Oneida, NY 13421

Proceeding Pursuant to § 309(a) of the
Clean Water Act, 33 U.S.C. § 1319(a)

FINDINGS OF VIOLATION

AND

ORDER

CWA-02-2011-3502

I. STATUTORY AUTHORITY

The following Findings are made and Order issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by the Clean Water Act, as amended, 33 U.S.C. § 1251 et seq. ("the Act"), and in particular Section 309(a) of the Act, 33 U.S.C. § 1319(a). This authority has been duly delegated by the Administrator to the Regional Administrator of Region 2 of the EPA, which authority has been duly re-delegated to the undersigned Director of the Division of Environmental Planning and Protection of Region 2 of EPA.

II. STIPULATIONS AND FINDINGS

1. Michael B. Rapasadi and Thomas R. Rapasadi ("Respondents") are "persons" as defined under Section 502 of the Act, 33 U.S.C. § 1362.
2. Michael B. Rapasadi is the owner of a 13.3-acre property ("the Property") identified as tax parcel 27.-2-56 (Town of Lenox, Madison County, NY), 8151 North Main Street, Canastota, NY (See "Exhibit A").

3. Thomas R. Rapasadi is the father of Michael B. Rapasadi, and is engaged in construction activities at the Property.
4. The Property contains wetlands ("the Wetlands").
5. The Wetlands drain to Cowaselon Creek which flows to Oneida Lake.
6. The Wetlands are waters of the United States, which came under the jurisdiction of the EPA and the U.S. Army Corps of Engineers ("the Corps") effective September 1, 1976. The Act's jurisdiction encompasses "navigable waters" which are defined as "waters of the United States" (33 U.S.C. § 1362(7)).
7. From 2008 through, at least, September 2010, Thomas R. Rapasadi has conducted construction activities using mechanized earth-moving equipment in the Wetlands involving stripping and on-site stock-piling of muck soils and discharge of earthen fill material brought to the Property.
8. The construction activities were observed from the roadside by Corps and EPA staff in September 2010.
9. On September 28, 2010, the Corps issued a Warning Letter regarding the construction activities to Michael B. Rapasadi, as the owner of the Property (Department of the Army file number 2010-01319.)
10. On November 15, 2010, the Corps inspected the Property, and determined that the construction activities described in Paragraph 7, above, involved discharge of fill material creating a fill pad of approximately 1.13 acre within the Wetlands, and stripping and stock-piling of soils around this fill pad, with the total area of construction activities being approximately 4 acres. (See "Exhibit B".)
11. On December 3, 2010, a Notice of Violation and Cease and Desist Order ("the Notice") was issued by the Corps to Michael B. Rapasadi for the activities described in Paragraph 7, above. The Notice required that Michael B. Rapasadi either remove the fill material and restore the Wetlands, or apply for an after-the-fact permit application to authorize the construction activities. The Notice also required that an after-the-fact application include a description of the purpose and need for the fill, an alternatives analysis, and a compensatory mitigation plan. A restoration plan or after-the-fact application was due to the Corps by December 31, 2010.
12. In March 2011, having received neither a restoration plan nor after-the-fact application, the Corps initiated coordination with EPA regarding further disposition of this case.
13. On April 26, 2011, EPA issued a Request for Information letter, pursuant to Section 308 of the Clean Water Act, 33 U.S.C. Section 1318(a), to Michael B. Rapasadi.
14. On May 10, 2011, EPA issued a Request for Information letter, pursuant to Section 308

of the Clean Water Act, 33 U.S.C. Section 1318(a), to Thomas R. Rapasadi.

15. The Request for Information letters described in Paragraphs 13 and 14, above, requested specific information from the Respondents for EPA's use in investigating this matter. Responses were due within thirty days.
16. Instead of responding to the Request for Information letters, Respondents mailed to EPA an incomplete, undated after-the-fact permit application seeking authorization for the construction activities. This application was received by EPA in August 2011. The application describes no specific purpose to the fill.
17. On September 1, 2011, after further consultation with EPA, the Corps transferred lead agency status for further enforcement of this case to EPA on the grounds that it is unable to obtain voluntary resolution of the violation.
18. The earthen fill material constitutes a "pollutant" within the meaning of Section 502 (6) of the Act, U.S.C. § 1362(6).
19. Mechanized earth-moving equipment is a "point source" within the meaning of Section 502(14) of the Act, U.S.C. § 1362(14).
20. The discharge of the earthen fill material into waters of the United States constitutes a "discharge of pollutants" as defined by Section 502(12) of the Act, 33 U.S.C. § 1362(12).
21. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States except as in compliance with Sections 301, 306, 307, 318, 402 and 404 of the Act.
22. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army to authorize discharges of dredged and fill into navigable waters of the United States.
23. The discharge of pollutants, consisting of dredged and fill material, into navigable waters of the United States without authorization from the Secretary of the Army as provided by Section 404 of the Act is unlawful under Section 301(a) of the Act, 33 U.S.C. § 1311(a).
24. The Secretary of the Army has not issued authorization pursuant to Section 404 of the Act, 33 U.S.C. § 1344, for the discharge of fill material described in Paragraph 7, above.
25. Based on the above Findings, EPA finds Respondents to be in violation of Section 301 of the Act, 33 U.S.C. § 1311, for the discharge of pollutants consisting of fill into waters of the United States from a point source without authorization by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. § 1344.
26. Each day that the subject discharge remains unauthorized by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. § 1344, constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

IN THE MATTER OF

Michael B. Rapasadi
2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi
2106 Lake Road
Oneida, NY 13421

Respondents.

Proceeding pursuant to §309(g) of the
Clean Water Act, 33 U.S.C. §1319(g)

Docket No. CWA 02-2013-3601

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I served the foregoing fully executed Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty and Notice of Opportunity to Request a Hearing, bearing the above-referenced docket number, in the following manner.

Copy by Certified Mail

Return Receipt Requested:

Michael B. Rapasadi
2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi
2106 Lake Road
Oneida, NY 13421

Original and One Copy

By Internal Mail (pouch):

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway, 16th floor
New York, New York 10007-1866

Copy By Facsimile and

Internal Mail (pouch) :

Helen S. Ferrara, Regional Judicial Officer
U.S. Environmental Protection Agency
290 Broadway, 16th floor
New York, New York 10007-1866

Date:

5/31/13



David G. Ahle
Environmental Scientist
U.S. EPA - Region 2

Entire Area of Disturbance \approx 4-acres

Rapasadi, Michael
D/A Processing No. 2010-01319
Madison County, New York
Quad: Canastota Sheet 2 of 2

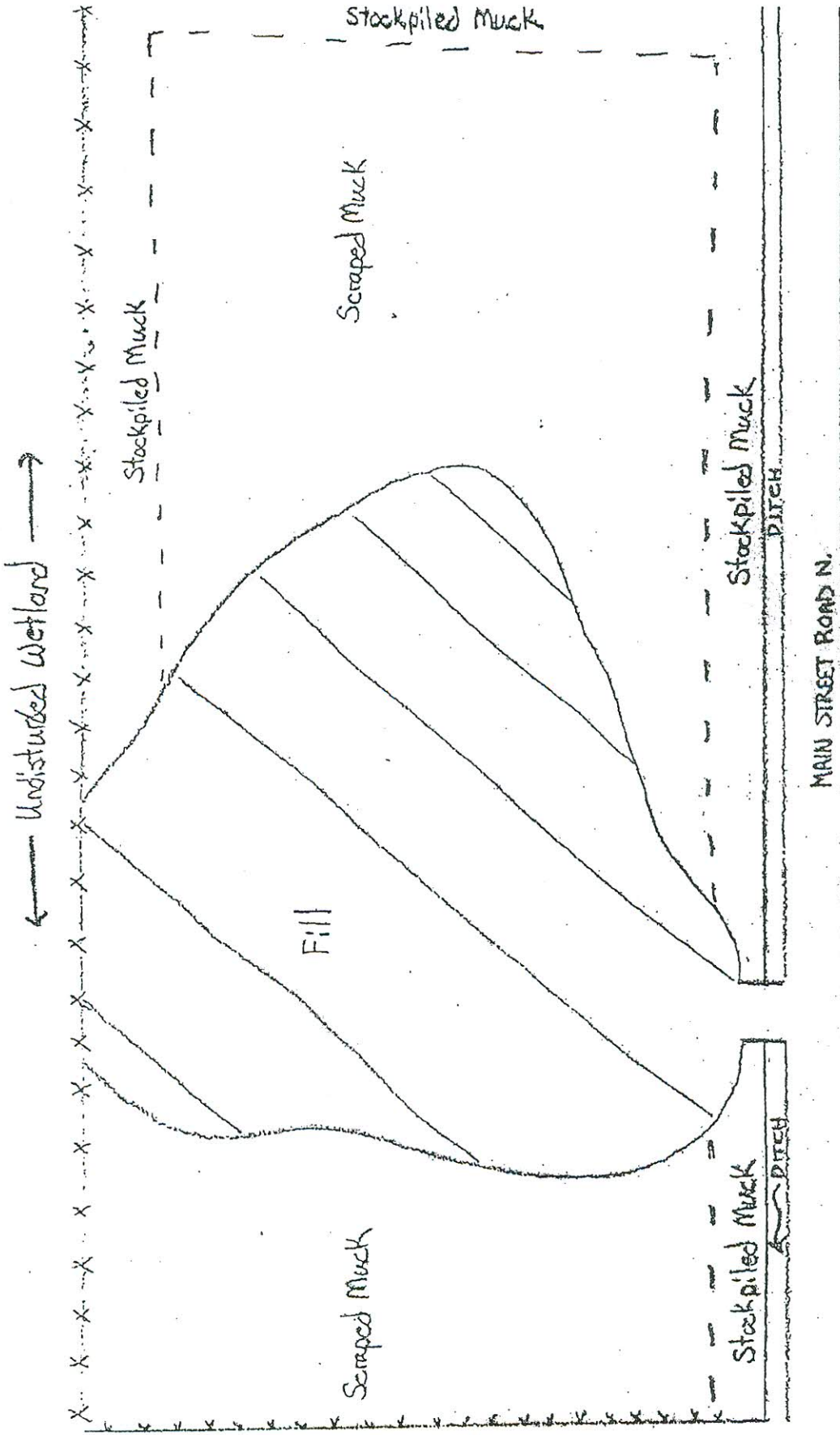


EXHIBIT B

* NOT TO SCALE *





15. Any questions concerning this Order should be directed to Mr. Pohle at the above address, fax number, and/or telephone number.

GENERAL PROVISIONS

1. The provisions of this Order shall be binding upon Respondents, and their agents, servants, employees and successors or assigns.
2. This Order does not constitute a waiver, suspension or modification of the requirements of the Act, 33 U.S.C. §1252 et seq., or any regulations promulgated thereunder, or any New York State or local law or regulation. This action is an enforcement action taken by EPA to ensure swift compliance with the Act. Issuance of this Order is not an election by EPA to forego any civil or any criminal action otherwise authorized by the Act, including issuance of penalties pursuant to Section 309(g) of the Act, 33 U.S.C. §1319(g).
3. The wetlands restoration provided pursuant to this Order shall not be offered by Respondents or any other person for consideration as compensatory mitigation for any other authorized or unauthorized discharge in waters of the United States, or as an environmentally-beneficial project for which Respondents or any other person may obtain tangible or intangible credit in any way.

EFFECTIVE DATE

This Order shall become effective upon the date of execution by the Director, Division of Environmental Planning and Protection, of EPA, Region 2.

In the matter of

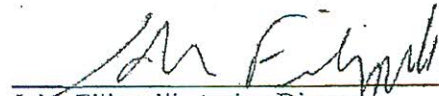
Michael B. Rapasadi
Thomas R. Rapasadi

Proceeding Pursuant to §309(a) of the
Clean Water Act, 33 U.S.C. §1319(a)
Docket CWA-02-2011-3502

For U.S. Environmental Protection Agency, Region 2

Date:

9/28/11


John Filippelli, Acting Director
Division of Environmental Planning and Protection

instruct him to undertake for the purpose of ensuring redevelopment of wetlands within the area, within the time-period instructed by EPA.

8. The restoration of the fill removal area shall be deemed fully successful by EPA when at least 85% of the fill removal area is densely vegetated with wetlands vegetation in a healthy state for a period of two consecutive years.
9. EPA may instruct Respondents to continue monitoring of the fill removal area, and excavation or replanting of such, for a period beyond two years if fully successful restoration is not achieved within two years.
10. EPA or its designated representative(s) may inspect the fill removal area periodically to assess compliance with this Order and to evaluate the degree of success of the restoration until such time as EPA deems the restoration fully successful.
11. If Respondents cannot comply with any of the deadlines or requirements in this Order, Respondents shall, upon learning of the delay or cause for a delay, immediately notify EPA via faxed message or overnight mail. Such notification shall include the anticipated length of the delay, the cause of the delay, the measures taken by Respondents to prevent or minimize the delay, and a timetable by which Respondents intend to implement these measures. If EPA and Respondents agree that the delay is caused by circumstances beyond the reasonable control of Respondents, such as an Act of God or third parties not under the direction of Respondents, or the obtaining of necessary permits or approvals where Respondents made all reasonable efforts to timely obtain said permits or approvals, the time for performance hereunder may be extended in the sole discretion of EPA for a reasonable period.
12. Any failure on the part of Respondents to carry out the requirements of this Order may result in further enforcement action pursuant to Section 309 of the Act, 33 U.S.C. §1319(a). EPA may also seek additional and other relief against Respondents for failure to achieve the requirements of this Order.
13. If Michael B. Rapasadi transfers ownership of all or any portion of the Property, he shall ensure the legal means for its compliance with this Order, including the restoration and monitoring requirements.
14. All written information required to be submitted to EPA pursuant to this Order shall be sent via certified mail (return-receipt requested), overnight mail and/or fax to:

Mr. David Pohle
Wetlands Protection Team
Water Programs Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway - 24th Floor
New York, New York 10007-1866
Fax: (212) 637-3889; Telephone: (212) 637-3824

III. ORDERED PROVISIONS

Based upon the foregoing Stipulations and Findings, and pursuant to the provisions of Section 309(a) of the Act, 33 U.S.C. § 1319(a), taking into account the seriousness of the violations involved and any good faith efforts to comply with the applicable requirements, EPA has determined that compliance with the following Order is reasonable. It is hereby ORDERED that:

1. Respondents shall cause no further discharges of dredged or fill material into waters of the United States except as authorized by a valid permit issued by the Corps pursuant to Section 404 of the Act, 33 U.S.C. § 1344.
2. Respondents shall undertake measures to promptly come into compliance with Section 404 of the Act, 33 U.S.C. § 1344, with respect to the unauthorized discharge of fill material described in the Findings, above, by removal of unauthorized fill material and restoration of the affected portion of the Wetlands. Specifically, all of the unauthorized fill shall be removed within ninety (90) days of the date of execution of this Order, and the fill removal area shall be restored to its pre-existing, wetland condition.
3. For the purpose of meeting the requirements of Paragraph 2, above, within thirty (30) calendar days of receipt of this Order, Respondents shall submit a restoration plan to EPA for review and written approval. The restoration plan shall include an engineering diagram of the fill removal area with overhead and cross-sectional diagrams of the required fill removal, a description of the proposed disposal location of the fill material in a non-wetland area, and a description of the best management practices to be used to control erosion and run-off during the work.
4. Respondents are responsible for ensuring removal of fill and restoration of the impacted Wetlands in compliance with this Order. Respondents are also responsible for proper disposal of removed fill.
5. Within ten (10) days after completion of the removal of all fill, Respondents shall submit a report of the completed work to EPA, including color photographs depicting the entire fill removal area, and a description of the disposal location(s) of the removed fill.
6. Monitoring of the restoration shall occur every six (6) months after completion of the fill removal for a period of two years. Respondents shall make overall observations of the percent coverage of the fill removal area with vegetation, the dominant species of vegetation present, and the average depth of water or the depth to soil saturation. Respondents shall submit this information in report form, with photographs of the entire fill removal area, to EPA within ten (10) days after making the observations.
7. After submittal of each report, Respondents shall undertake any re-excavation, planting, erosion-control measures, or similar alterations to the fill removal area, which EPA may

Exhibit B

to Motion to Dismiss the Complaint, dated June 24, 2013

From: [Julia Zimmer](#)

Sent: Thu 9/13/2012 10:38 AM

To: Pohle.David@epamail.epa.gov

Cc:

Subject: Rapasadi Docket No. CWA-02-2011-3502

Attachments:

Dear Mr. Pohle,

We are waiting for the response to our FOIL request made to Buffalo Army Corp of Engineers before we can proceed.

It is my understanding that we have an extension of time until that information is received and a reasonable time to receive approval from the State for any work that may be done.

In the meantime, we have appealed the decision itself but we hope for a practical solution to this situation.

Very Truly Yours,

John Benjamin Carroll, P.C.

SENT ON BEHALF OF MR. CARROLL BY:

Julia M. Zimmer

Paralegal

Carroll & Carroll Lawyers, P.C.

440 South Warren Street

Syracuse, New York 13202

(315) 474-5356 x103

(315) 474-5451 fax

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Carroll & Carroll Lawyers, P.C.

From: [David Pohle \[Pohle.David@epamail.epa.gov\]](mailto:Pohle.David@epamail.epa.gov)

Sent: Mon 9/17/2012 9:04 AM

To: [Julia Zimmer](#)

Cc:

Subject: Re: Rapasadi Docket No. CWA-02-2011-3502

Attachments:

Dear Ms. Zimmer,

If I recall correctly, Ms. Feinmark (our attorney) informed Mr. Carroll during our teleconference last month that he should submit a Freedom of Information Act (FOIA) request to the [EPA](#) because we have the Corps' file. When the case was transferred to the EPA, the file was also transferred. I have the file in my office.

Please simply send an email to me in which you (1) describe in detail the records which you seek, and (2) state that you are requesting the records pursuant to the Freedom of Information Act.

Also please let me know if it is acceptable to send you the records on CD or DVD. Otherwise we would have to print out much of what we have as scanned documents or digital photographs, and then charge you a per page fee of something like twenty-five cents per page. (I do not recall the exact amount.)

When I receive your e-mail, I forward it to our FOIA Officer, and she logs the request into the system and assigns a request number, and I respond to your information request.

Sincerely,

Dave Pohle

From: Julia Zimmer

Sent: Mon 9/17/2012 9:15 AM

To: David Pohle

Cc:

Subject: RE: Rapasadi Docket No. CWA-02-2011-3502

Attachments:

Dear Mr. Pohle,

I am requesting a copy of the Corps' file for Mr. Rapasadi's matter with your office (Docket No. CWA-02-2011-3502). We are requesting the records pursuant to the Freedom of Information Act. We will accept these materials on a CD or DVD.

Thank you for your attention to this matter.

Julia M. Zimmer
Paralegal
Carroll & Carroll Lawyers, P.C.
440 South Warren Street
Syracuse, New York 13202
(315) 474-5356 x103
(315) 474-5451 fax

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Carroll & Carroll Lawyers, P.C.

From: Julia Zimmer

Sent: Mon 9/17/2012 9:26 AM

To: David Pohle

Cc:

Subject: RE: Rapasadi Docket No. CWA-02-2011-3502

Attachments:

Dear Mr. Pohle,

Pursuant to your email received 9/17/12, please consider this a FOIA request for all records of the EPA or US Army Corp. of Engineers or the State of NY now in possession of the EPA dealing with Docket No. CWA-02-2011-3502. A CD or DVD of these records is acceptable.

Very Truly Yours,

John Benjamin Carroll

SENT ON BEHALF OF JBC BY:

Julia M. Zimmer

Paralegal

Carroll & Carroll Lawyers, P.C.

440 South Warren Street

Syracuse, New York 13202

(315) 474-5356 x103

(315) 474-5451 fax

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Carroll & Carroll Lawyers, P.C.

From: [Calderon, Wanda \[Calderon.Wanda@epa.gov\]](mailto:Calderon.Wanda@epa.gov)

Sent: Thu 9/20/2012 4:33 PM

To: [Julia Zimmer](#)

Cc:

Subject: R2-ACKNOWLEDGMENT LETTER IMPORTANT REFERRAL NOTICE FOR ENVIRONMENTAL
AUDIT FOIAS

Attachments: [R2-ACKNOWLEDGMENT LETTER IMPORTANT REFERRAL NOTICE FOR
ENVIRONMENTAL AUDIT FOIAS.doc\(34KB\)](#)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2, 290 Broadway, 26th Floor
New York, NY 10007
212-637-3668
212-637-5046 (fax)
Calderon.Wanda@epa.gov

September 20, 2012

Ms. Julia M. Zimmer
Carroll & Carroll Lawyers, PC
440 South Warren Street
Syracuse, NY 13202

RE: Request No: 02-FOI-01491-12

Dear Ms. Zimmer,

This is to acknowledge receipt of your Freedom of Information Act (FOIA), 5 U.S.C. 552, request dated September 17, 2012 and received in this office on September 17, 2012, for records related to:

Rapasadi CWA docket

The program(s) office(s) that have been assigned this request will be responding to you directly. The Agency has twenty (20) working days to respond to your request, except when you have agreed to an alternate due date or unusual circumstances exist that would require an extension of time under 5 U.S.C. 552 (a) (6) (B).

There is now a new link which allows Environmental Auditors, Real Estate Agents, Mortgage Banks, Engineering and Environmental Consulting Firms and the public, to determine if EPA databases have records on a specific property without filing a Freedom of Information Act (FOIA) request. Please note the results of this search will be identical to the information you would receive by filing a FOIA request with EPA for these records. MyPropertyInfo is a single reporting tool for printing from multiple EPA databases which can be accessed by visiting www.epa.gov/foia; You can also find out the status of your request.

Please include your FOIA number in all subsequent communications with respect to this assignment. It is also recommended that you include your email address in all related communications for faster processing. If you have any additional questions, contact me.

Sincerely,
Wanda Calderon
FOIA Specialist

bcc: D. Abrines, 2DEPP-RPB
D. Pohle, 2CWD-WMB
M. Isaac, 2CWD
D. Montella, 2CWD-WMB
L. Fischer, 2ORC-WGLB
2PAD-POB



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2, 290 Broadway
New York, NY 10007

November 16, 2012

Ms. Julia M. Zimmer
Paralegal
Carroll & Carroll Lawyers, PC
440 South Warren Street
Syracuse, NY 13202

Re: Freedom of Information Request No. **02-FOI-01491-12**
Rapasadi Docket No. CWA-02-2011-3502
Dated: September 17, 2012

Dear Ms. Zimmer:

Our wetlands protection program office does have responsive information concerning your request.

Before we can process your request, we need to find out if your firm will accept the FOIA costs. The cost for processing the information requested is \$198.00. We need to receive from you an email giving us an assurance of payment for this amount. Please forward an email to Ms. Wanda Calderon at calderon.wanda@epa.gov. Please respond to us by November 30, 2012. If we do not hear back from you by November 30, 2012, we will cancel your request.

Please include the above referenced request number in any subsequent communication relating to this request.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Adolph S. Everett", is located below the "Sincerely yours," text.

Adolph S. Everett, P.E.
Chief
Hazardous Waste Programs Branch

From: Julia Zimmer

Sent: Fri 3/1/2013 11:04 AM

To: calderon.wanda@epa.gov

Cc:

Subject: FOIA Request No. 02-FOI-01491-12

Attachments: Scanned-image-6.pdf(158KB)

Dear Ms. Calderon,

I apologize for the delay in responding to the attached letter, there was a mis-communication in our office regarding payment.

Our firm will accept the costs of \$198.00 for this request. I can provide you with a credit card number or mail you a check, which ever is quicker.

Thank you for your attention to this matter.

Sincerely Yours,
Julia M. Zimmer
Paralegal
Carroll & Carroll Lawyers, P.C.
440 South Warren Street
Syracuse, New York 13202
(315) 474-5356 x103
(315) 474-5451 fax

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Carroll & Carroll Lawyers, P.C.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007**

IN THE MATTER OF:

Michael B. Rapasadi

2106 Lake Road
Oneida, NY 13421

Thomas R. Rapasadi

2106 Lake Road
Oneida, NY 13421

Respondents.

**Proceeding pursuant to § 309(g)
of the Clean Water Act, 33 U.S.C. § 1319(g)**

**Proceeding to Access Class I
Civil Penalties Pursuant to Section
309(g) of the Clean Water Act**

Docket No. CWA-02-2013-3601

Julia M. Zimmer, first being duly sworn, deposes and says:

1) I am a paralegal at Carroll & Carroll Lawyers, P.C., the attorneys for the Respondents herein.

I make this affidavit in support of a Motion to dismiss the Complaint attached as "Exhibit A" to the Affidavit of John Benjamin Carroll dated June 24, 2013.

2) I called Wanda Calderon at the EPA several times between November 16, 2012 and March 1, 2013. During these phone calls, I stated our office would pay for the FOIL records pursuant to the Letter dated November 16, 2012 (see Exhibit B of the attorney affidavit). However, I was informed by the EPA that they could not accept payment without issuing an invoice. I therefore asked that an invoice be issued. We did not receive an invoice until June 18, 2013 after several more phone calls. We have paid the invoice, but have not yet received the records.

by depositing same enclosed in a postpaid properly addressed wrapper, with Express Mail postage, in a post office-official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.



Julia Zimmer

Sworn to before me this
14 day of March, 2013



Notary Public

Notary Public, State of New York
Qualified in Madison County No. 02CA4984904
My Commission Expires August 5, 2014